

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: INTRASTATE ACCESS SERVICE CHARGES [199 IAC 22.14(2)"d"(1)]	DOCKET NO. RMU-03-11
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ORDER DENYING MOTION FOR STAY

(Issued July 20, 2004)

On March 18, 2004, the Utilities Board (Board) issued an "Order Adopting Amendments" in this docket, amending the Board's access charge rules at 199 IAC 22.14(2)"d"(1). The amendments became effective on May 19, 2004.

On May 12, 2004, a group of 17 competitive local exchange carriers (CLECs) filed a motion for a stay of one of the Board's amendments, pending judicial review of the Board's action. (The CLECs are identified in Attachment A to their motion.) Specifically, the CLECs seek a stay of 199 IAC 22.14(2)"d"(1)"2," which requires that competitive carriers that concur in the Iowa Telephone Association (ITA) access service tariff, but offer service in exchanges where the incumbent carrier's intrastate access rate is lower than the ITA rate, must deduct the carrier common line charge (CCLC) from their own access tariff. (Competitive carriers always have the option of filing a higher access rate, provided they also file adequate cost support information. The amended rule merely changes the "safe harbor" provisions associated with concurring in the ITA tariff.)

In their motion, the CLECs state that they have filed a petition for judicial review of the Board's adopted amendments. (A copy of the petition is attached to the motion as Attachment B.) They seek a stay of the identified rule pending completion of the judicial review proceedings.

The CLECs argue that a stay should be granted because they are likely to prevail on the merits in the judicial review proceeding, based upon their exceptions to the proposed rule as expressed in their statements filed with the Board during the rule making proceedings. (Motion at pp. 3-4.)

The CLECs also argue that they will suffer irreparable damage if they are required to eliminate the CCLC in compliance with the amended rule and then prevail in the judicial review proceedings because "they will not be permitted to subsequently charge a different rate [for intrastate access services provided between May 19, 2004, and the conclusion of the judicial review proceedings] under the filed rate doctrine." (Motion at p. 4.) The CLECs assert this loss of revenue would amount to irreparable injury.

Next, the CLECs argue that entry of a stay will not cause substantial harm to any other parties to this proceeding, because the Board can order the CLECs to refund any over-collections if the stay is granted and the Board's amendment is upheld on judicial review. The CLECs cite Mid-Iowa Community Action, Inc., v. Iowa State Commerce Commission, 421 N.W.2d 899, 901 (Iowa 1988) in support of this proposition. (Motion at pp. 4-5.)

Finally, the CLECs argue that "a public interest sufficient to justify the grant of a stay is codified in Iowa Code § 476.95 calling for the promotion of telecommunications competition." (Motion at page 5.)

On June 2, 2004, AT&T Communications of the Midwest, Inc. (AT&T), filed an opposition to the CLECs' motion for stay. AT&T asserts that the CLECs are not likely to prevail on the merits of the judicial review proceeding because their petition does not raise any issues of fact or law that have not been thoroughly considered and rejected by the Board. (Opposition at p. 2.) AT&T also argues that the CLECs will not suffer irreparable injury in the absence of a stay, because the only injury they have alleged is loss of revenue, and financial loss does not constitute irreparable harm. Teleconnect Co. v. Iowa State Commerce Commission, 366 N.W.2d 511, 514 (Iowa 1985). Moreover, AT&T argues, the Board has the authority to adjust the CLECs' rate structure in the future, if that is necessary due to reversal of the Board's amendment on judicial review. In support of this proposition, AT&T cites cases holding that an agency has the authority "to undo what has been wrongfully done by virtue of an order that has been upset on judicial review," including Natural Gas Clearinghouse v. FERC, 965 F.2d 1066, 1073 (D.C. Cir. 1992).

Next, AT&T argues that a stay of the amendment would impose serious harm on AT&T and other interexchange carriers (IXCs) because for the duration of the judicial review proceedings they would be required to pay charges that the Board has determined to be unlawful. AT&T asserts that while a refund obligation might partially

protect the IXCs, the actual refunds might be jeopardized by the "uncertain financial condition of some CLECs." (Opposition at p. 3.)

AT&T argues that the public interest in promoting fair competition in telecommunications markets supports denial of the motion for stay. If a stay is granted, the IXCs would have to pay charges that the Board has found to be unreasonable and unlawful, charges that the competitive carriers are able to collect only because of their monopoly power over access to their end-user customers.

Finally, AT&T asserts in the alternative that if the Board were to grant a stay, the Board should require the CLECs to post a bond and conduct a hearing to determine the appropriate amount of the bond. (Opposition at p. 4.)

The Board finds it is appropriate in this proceeding to consider three of the four factors from Teleconnect and Iowa Code § 17A.19(5)"c" in ruling on the motion for a stay pending judicial review, even though the Board is not bound by that four-factor test when ruling on an application for a stay. Applying those factors to this case, the Board will deny the CLECs' motion.

The first factor is the CLECs' likelihood of success on the merits of the appeal. As the Board has stated in other cases, the Board normally gives very little, if any, weight to this factor; an agency is unlikely to ever concede that a party is likely to prevail on judicial review, so if this factor were given significant weight, an agency would almost never exercise its authority under § 17A.19(5) and grant a stay.

The other three factors appear to be more appropriate for agency consideration:

1. The extent to which the applicant will suffer irreparable injury if relief is not granted;
2. The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings; and
3. The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

In this matter, the CLECs have not shown they will suffer irreparable injury if they do not receive a stay. They assert that they should not be required to reduce their access charges because if they prevail in the end, they may be unable to collect the shortfall from the IXCs. This mere possibility, without more, does not amount to "irreparable injury." AT&T has asserted that if events play out as the CLECs hope, the Board will have the authority to address any loss of revenue the CLECs have suffered. Moreover, the Teleconnect court made an explicit finding that a carrier's potential loss of revenue associated with access charges while judicial review is pending "does not amount to irreparable damage." 366 N.W.2d at 514. This factor does not weigh in favor of granting the motion for stay.

As to the next factor, AT&T has alleged it (and other IXCs) will be substantially harmed if the stay is granted because the IXCs will be required to pay access service rates that the Board has determined to be unreasonable and unlawful. This argument is not persuasive, by itself; if the Board accepted this argument, without more, it would never grant a stay of any agency action that affects rates. Something more is required.

However, there is another group that would be harmed if a stay is granted. The incumbent local exchange carriers (ILECs) in each of the affected exchanges are competing with the CLECs, yet the ILECs often have much lower intrastate access rates. This is the very reason the Board adopted the rule in question: Using the ITA access charges, the CLECs have benefited from a monopoly-based revenue stream at a level that is unavailable to the ILECs, effectively subsidizing the CLECs' competitive rates, to the disadvantage of the ILECs. This is the problem the amended rule is intended to address; it will not be helped by granting a stay. This factor weighs against granting the stay.

The final factor, the public interest, should be the most important one in the Board's consideration. The CLECs allege that granting a stay will promote competition between local exchange carriers, while AT&T appears to argue a stay will hamper competition among IXCs. Clearly, the primary public interest at issue is the promotion of competition in the telecommunications marketplace. The Board finds that local exchange competition will best be promoted by denying the stay, since the amended rule will tend to make the competition between CLECs and ILECs more equal (by limiting the CLECs' monopoly-based access revenue stream).

In the end, all three of the relevant factors weigh against issuance of a stay. The Board will deny the CLECs' motion for a stay pending judicial review.

IT IS THEREFORE ORDERED:

The "Motion for Stay Pending Judicial Review" filed in this docket by the CLECs on May 12, 2004, is denied.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 20th day of July, 2004.